



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 24 of 2006

MICHAEL OMONDI OTIENO.....1ST
PLAINTIFF

ERICK ONYANGO ORWA.....2ND
PLAINTIFF

VERSUS

HILDA AYACKO OCHIENG.....1ST
DEFENDANT

DISTRICT LAND REGISTRAR

UASIN GISHU DISTRICT.....2ND
DEFENDANT

RULING

The Plaintiff presented to court a plaint dated 22nd February 2006 and filed on the same date seeking the following reliefs inter alia

- a) A permanent injunction to restrain the Defendants whether by themselves or by servants or agents from applying for consent to subdivide, and/or subdividing or in any other manner dealing with land parcel number Pioneer/Ngeria Block (EATEC)/951 hereinafter “the suit property”
- b) A declaration that the said parcel of land can only be partitioned and subdivided in 3 portions proportional to each person’s contribution towards its purchase price/

Simultaneously with the filing of the plaint the Plaintiffs presented a chamber summons Application dated 22nd February 2006 seeking an injunction to restrain the Defendants from subdividing or issuing title arising from or in any other manner altering or causing the alteration of the register or any entries therein relating to the suit property. The Application was supported by the sworn affidavit of Eric Onyango Orwa. It was founded on the grounds that Defendants are in the process of severing ownership of the suit property contrary to the agreement between the owners thereof and without the Plaintiffs’ consent. That unless restrained the title to the said land will be surrendered and new titles will be issued which will not reflect the actual acreage of the Plaintiff’s shares and the Plaintiffs stand to suffer. That the second Defendant was acting contrary to the law in the process of partition and is acting with bias against the Plaintiffs. That the Plaintiffs have a *prima facie* case with a chance of success.

The gist of the Plaintiffs case from the supporting affidavit is that on or about 2000/2001 they purchased

land together with the 1st Defendant from Lonrho Agribusiness EA Ltd for a sum of Kshs. 228,000. The Plaintiffs contributed Kshs. 91,000/= each and the 1st Defendant contributed the rest. The agreement was that each of them was to get a portion accordingly to their contribution. That the 1st Defendant secretly obtained the title deed in their joint names. That the 1st Defendant has refused to partition the suit property so that each could get their rightful share. That the second Defendant issued notice to partition the suit property but it is apparently that he has not been fair to them because he has not conducted an enquiry as required under section 104 and is biased. That unless restrained the second Defendant will proceed and partition the land to their prejudice.

The first Defendant on being served filed a replying affidavit on 27th February 2006. She stated that in the year 2000 she was an employee of EATEC. EATEC was an operating Division of Lonrho Agribusiness (EA) Ltd. That the employer was disposing off her assets. She applied to be allotted four acres in lieu of her redundancy package. That in a letter dated 4th July 2000 she was advised that her redundancy package was not sufficient to purchase the 4 acres and was required to pay a sum of Kshs. 182,000/= by 31st August 2000. She was not able to raise the sum by 31st August 2000 and was issued with a final demand notice to pay by 30th September 2000. The second Plaintiff approached her and she offered to sell to him one acre at Kshs. 182,000/=. The second Plaintiff was not able to arise the whole amount of Kshs. 182,000/= and he invited the first Plaintiff. It was their agreement each would get half an acre. After payment of the sum of Kshs. 182,000/= she was issued with an occupation letter. She therefore denies that they bought three acres from Lonrho Agribusiness (EA) Ltd together with the Plaintiffs. She offered them one acre out of her four acres. That the four acres was contained in tow parcels F 773 and F 808. She deposes that she would be disposed 2 ½ acres if the Plaintiffs have their way. She denied secretly obtaining title to the suit property. That she has required the Plaintiffs to sign forms for partitions but they have refused, that she then approached the second Defendant for assistance who issued notice to the Plaintiffs under section 104 of the Registered Land Act.

The Plaintiff filed a further replying affidavit on 2nd March 2006. The Plaintiffs contend that they were not aware that the first Defendant was purchasing 4 acres from Lonrho Agribusiness. That what they talked about was to raise the demanded purchase price and not the mode of distribution. The second Plaintiff denies been unable to raise the sum of Kshs. 182,000/= and depones that he was paying on his behalf and the first Plaintiff. That the value of three acre plot was Kshs. 228,000. That the register is conclusive on the fact that they the property is jointly owned.

The first Defendant then filed a further replying affidavit and produced a certificate of official search dated 27th February 2006. It showed that the suit premise was been held as tenants in common in the ratio of 2:0.5:0.5. She also produced a document showing that she was purchasing 4 acres from EATEC. It was dated 24th May 2000.

I have considered the submissions of counsel and the evidence available at this interlocutory stage. An objection has been taken as to whether an injunction can issue against the second Defendant in light of the provisions of section 16 of the Government Proceedings Act. The wording of the section seems to preclude this court from granting an injunction against the government. The second Defendant is only an officer of government and hence not covered under the provisions of section 16 of the Government Proceedings Act.

An applicant who seeks a temporary injunction pending hearing must satisfy the parameters of the well celebrated case of ***Giella v. Cassman Brown***. He must show that he has a prima facie case with a probability of success. Have the Plaintiffs shown such a case. The starting point should be the certificate of official search produced by the first Defendant in her further affidavit. It shows that the property is owned as tenants in common. The share of each party's share is certain. The first Defendant owns two acres and the Plaintiffs half acre each. The Plaintiffs' theory of joint partnership to purchase three acre from EATEC is displaced by the evidence adduced by the first Defendant. Exhibit HAO6 is proof at this stage that the Plaintiff was allotted 4 acres by EATEC in consideration of her pension dues. The plots were 774 and 808. She has annexed receipts of payments as HA07. According to her she involved the

second Defendant because of her inability to raise a sum of Kshs. 182,000/= that was demanded as shortfall of her pension dues this fact is supported by exhibit "HAO1". Exhibit "HAO2" supports final demand notice given. Exhibit "HAO3" shows that she managed to pay the sum of Kshs. 182,000/= and was given letter of occupation. She has been honest on how the sum of Kshs. 182,000/= was raised. In the absence of any agreement to show how the parties intended to distribute the property the Plaintiffs are on shaky grounds.

If in doubt on existence of prima facie case I am required to consider the balance of convenience. Does the balance of convenience favour the Plaintiffs? I do not think so in light of exhibit "HAO8". This court must give effect to the property rights of each individual. The Plaintiffs interest on the property must be balanced against the first Defendant's. It would be desirable that the title should be partitioned given that the parties cannot transact in harmony in view of this litigation. The process of partitioning is clearly laid down in the Registered Land Act. While following that procedure it would be contrary to principles of justice to prevent the law from taking its course.

Even if I were wrong on the balance of convenience I would not have granted the injunction because damages would be an adequate remedy. It has not been contended that the first Defendant may not pay any damages that the Plaintiffs may suffer. Should the Plaintiffs succeed the value of one acre of land can be ascertained and they be compensated accordingly.

For these reasons I dismiss the Chamber Summons Application dated 22nd February 2006 with costs in the cause.

DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER .2012

F. AZANGALALA
JUDGE

In the presence of: Mr. Khaya for the Plaintiff

Mr. Kiplimo h/b for Defendant